HUP AIK TIN MINING CO. v. KAM HOY TRADING

[F.C. (Barakbah L.P., Suffian and MacIntyre F.JJ.) May 14, 1968]

[K.L. — Federal Court Civil Appeal No. X46 of 1967]

Partnership — Dissolution of — Withdrawal from — Failure to register withdrawal — Notice not given to plaintiff — Registration of Businesses Ordinance, 1956, s. 6(1).

Practice and Procedure — Service on partners — Partners' withdrawal from firm not registered nor notice given.

This was an appeal against the dismissal of an application by the defendant firm to set aside the service of the writ of summons and notice ([1967] 2 M.L.J. 179). The writ of summons and notice were served on three persons as partners of the defendant firm. These persons were former partners and they had, at the date of the commencement of the proceedings assigned their interests in the firm. Their names continued to be registered at the Registry of Businesses as partners of the defendant firm due to the failure of the assignee of the interests in partnership to file their form of withdrawal from the partnership with the Registrar of Businesses.

Held, dismissing the appeal: a person who has habitual dealings with a partnership is entitled to be specifically notified of the withdrawal of the partners. A mere notice to the Registrar of Businesses is insufficient. Therefore, *a fortiori* in a case where the forms of withdrawal were not sent to be registered, the service of the writ of summons and notice on the persons whose names appear in the register as partners was good service.

Case referred to:—

(1) *Re Chop Yew Seong; Ex parte Sri Sundari Palayakat Co.* [1958] M.L.J. 239.

FEDERAL COURT.

S. Kulasegaran for the appellants.

Peter K.C. Yeoh for the respondents.

Barakbah L.P.: This is an appeal from the judgment of Mr. Justice Gill who dismissed the application with costs. After hearing the arguments by counsel for both parties we dismissed the appeal, intimating that we would give our reasons later, and I now do so.

The facts in this case are simple. The plaintiffs claimed the sum of $4,425.70 being balance owed by the defendants to the plaintiffs for the supply of diesoline and other lubricants from July 1965 to October 1965. The total amount due at the end of December 1965 was $4,625.70. On or about 16th September, 1966, a sum of $200 was paid to account, leaving a balance of $4,425.70 which was the subject matter of the suit.

The writ of summons and notice were served on Foong Soon Hin, Wong Nung Chong and Loo Ng Ming as partners of the defendant firm. They alleged that they had ceased to be partners during the said period and filed an application in the High Court to set aside the service of the writ of summons and notice. The application was dismissed; hence this appeal.

In their affidavits in support of the application Wong Nung Chong and Loo Ng Ming said that they had ceased to be partners on 27th February, 1965, having sold and assigned all their shares, rights and interests in the firm to Pang Kim Wah alias Pang Sang and Foong Soon Hin under an agreement of the same date. They also duly signed the form of withdrawal from the partnership on the same day and handed to Pang Sang for filing with the Registrar of Businesses. They subsequently learned that Pang Sang did not send the withdrawal form for registration.

Foong Soon Hin in his affidavit said that he had ceased to be a partner on 17th August, 1965, having sold and assigned all his shares, rights and interests in the firm to Pang Kim Wah alias Pang Sang under an agreement of the same date. He also signed the form of withdrawal from the partnership on the same day and handed it to Pang Sang for filing with the Registrar of Businesses. Pang Sang also did not send in the withdrawal form for registration.

According to section 6(1) of the Registration of Businesses Ordinance, 1956:—

> "Save as hereinafter expressly provided, when and so long as any person is recorded in any register as an associate of a business, it shall be evidence against him or any person claiming through or under him that he was such an associate unless it is proved that such person was not at any material time such an associate and that he was recorded as such in such register through a *bona fide* mistake, or without his knowledge and in fraud of him."

It is not disputed that the names of Foong Soon Hin, Wong Nung Chong and Loo Ng Ming had been properly registered as partners in the Registry of Businesses and were still in the register when this action was filed, and that their firm had dealings with the plaintiffs. What in fact happened was that they had given their withdrawal forms to Pang Sang who failed to send them to the Registrar of Businesses and therefore their withdrawals were not registered. Even if the forms were received by the registrar, in my view, the plaintiffs should have been given notice of the withdrawal by the defendants, and there was no evidence to this effect.

In my opinion the case of *Re Chop Yew Seong; Ex parte Sri Sundari Palayakat Co.*[1] is on all fours with the present case. The headnote reads:—

> "When a known partner retires, or a partnership is dissolved, notice of that fact must be given to the world at large by advertisement, and to old customers by some special communication. An old customer is entitled to a more specific notice than a person who never dealt with the firm at all; and in considering whether notice of dissolution or retirement is or is not sufficient, a distinction must be made according as the person sought to be affected by notice was or was not a customer of the old firm. A mere notice to the Registrar of Business Names is not sufficient."

A fortiori, in the instant case where the forms of withdrawal were not received by the Registrar of Businesses and the plaintiffs were not notified.

In the circumstances there did not appear to be any merits in this appeal, and it was therefore dismissed with costs.

Suffian and **MacIntyre F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Heng, Chen & Co.*

HAJI TALIB v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye, Suffian & MacIntyre F.JJ.) August 19, 1968]

[K.L. — Federal Court Criminal Appeal No. X13 of 1968]

Penal Code, ss. 302 & 304 — Murder — Defences of provocation and self-defence put to jury — Defence of sudden fight not put to jury — Whether omission fatal.

The appellant was convicted of murder and sentenced to death. The learned trial judge in his summing up to the jury had directed them that only two defences were open to the accused — namely provocation and self defence. The appellant's main ground of appeal was that the defence of sudden fight which is separate and distinct from the defence of grave and sudden provocation should have been distinctly put as such to the jury so that they could have considered all the evidence in relation thereto.

Held: there was a *lacuna* in the omission to put the specific defence of sudden fight to the jury even though it had not been raised by defence counsel and accordingly the appeal should be allowed and the conviction of murder set aside and a verdict of culpable homicide not amounting to murder substituted.

FEDERAL COURT.

D.R. Seenivasagam (*E.V. Devadason* with him) for the appellant.

K. Somasundram (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: The appellant was on July 2, 1968 convicted on a charge of murder, under section 302 of the Penal Code, and sentenced to death. The verdict of the jury was by a majority of 5 to 2.

The facts were unusually simple. At about 11 a.m. on September 11, 1967 the appellant encountered the deceased, a Chinese convert to Islam, on a lonely stretch of the Simpang Pertang Road at the 58th Milestone near Durian Tipus. There were no eye-witnesses of what took place. The only version of the incident was that supplied by the appellant's own confession to the magistrate. He had voluntarily surrendered himself at the nearest police station directly after the event.

The confession was brief and may be quoted in full:—

"On 25.8.1966 Wong Tiu hacked me with a parang here (pointing to a scar on the chin), a second hacking was on the right thumb, a third hacking was this (pointing to the right below the elbow), a fourth hacking was on the left side of body. Today 11.9.67 I rode a bicycle carrying rubber seedlings' shovel. On arrival near a bridge about a mile away from the Durian Tipus police station, I was going along on my left side. When Wong Tiu came face to face with me, he rushed at me on the bicycle and pushed me. The shovel which was carried on the shoulder with the blade facing towards the front straightaway struck the left side of the head. I retreated from that place. Wong Tiu rushed at me. I stopped (him) with the shovel's blade. It struck the left side of the head also. Again I retreated, he then rushed (at me). I stopped (him) with the shovel's blade and it also struck him again. He then fell on the road. I ran and took the bicycle and straightaway surrendered myself at the Durian Tipus police station and lodged a report."

This confession had been admitted without any objection by the defence. At the trial the appellant elected to say nothing. He could not, therefore, be cross-examined by the prosecution.

The learned trial judge in his summing-up to the jury had directed them that two defences only were open to the accused, namely, provocation and self-defence, as to each of which his directions were clear and wholly impeccable. Depending upon how one looks at the summing-up as a whole, however, it could with equal force, be said that a possible third ground of defence had or had not been adequately put to the jury. This is Exception 4 to section 300 of the Penal Code, which provides as follows:—

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without an offender having taken undue advantage or acted in a cruel or unusual manner."

On the one hand it could fairly be argued that the directions given regarding provocation comprehended all that need be said also with regard to Exception 4.

The appellant's main ground of appeal, however, is that Exception 4, being separate and distinct from the defence of grave and sudden provocation, which is Exception 2, should have been distinctly put as such to the jury, so that they could have considered all the evidence in relation thereto, even after they were minded to reject the defence of provocation.

We have given this submission by learned counsel for the appellant our most careful consideration. With the greatest respect for the learned trial judge, whose summings-up have always been models of precision and comprehensiveness for many years past, we feel that perhaps in this case there was in effect a *lacuna* in the omission to put the specific defence of sudden fight to the jury, even though it had not been raised by defending counsel. It was quite possible that, had the jury been directed on this defence, the very nature of the deceased's 4 serious head wounds, each of which was sufficient to cause death, might be held to have taken